JD–18–04
Louisville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SPORTPAINT, INCORPORATED Case 9–CA–40287

and

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

and Case 9–CA–40337

EDWARD SUTTON, AN INDIVIDUAL

*Patricia R. Fry, Esq.,* for the General Counsel.
*James U. Smith, III, Esq., (Smith & Smith),*
of Louisville, Kentucky, for the Respondent.

# DECISION

## Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Louisville, Kentucky on January 13, and 14, 2004. The charges were filed June 6, and June 27, 2003 and the complaint was issued October 27, 2003.

The General Counsel alleges that Respondent, Sportpaint, Inc., violated Section 8(a)(1) in providing advice and assistance to employee Edward Sutton in circulating and filing an employee petition seeking to decertify the Union, promising to remedy Sutton's grievances if he filed the petition, and coercively interrogating Sutton regarding the filing of the petition.

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the Act in subjecting Sutton to more onerous working conditions, issuing him several disciplinary warnings and a one-day suspension, transferring Sutton from his job as a painter to a job sanding defective parts on June 5, 2003, reducing his pay from $12 per hour to $8 per hour on June 5, and by doing so constructively discharging Sutton on that date. The General Counsel alleges that all these personnel actions were taken in retaliation for Sutton's failure to file the decertification petition.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## Findings of Fact

### I. Jurisdiction

At all relevant times, Respondent, Sportpaint, Inc., operated two facilities, plant #2 and plant #3, in Louisville, Kentucky. Respondent's business primarily involves painting automobile and motorcycle parts. It annually purchases and receives goods at plants 2 & 3, which are valued in excess of $50,000, from suppliers located outside of Kentucky. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

Edward Sutton was hired by A-Better, a temporary employment agency, in August 2002, to work as a painter at Sportpaint's plant 3 at a pay rate of $10 per hour. At plant 3, Respondent paints such items as automobile seat backs and bumpers in a high volume operation. The painters work in paint booths with a "reciprocator," which sprays the paint over most of the front and back of the seat or bumper surface. Edges and other irregular surfaces are painted by hand. Parts then go to a spatter booth in which more paint is sprayed onto a part to give it a textured surface. Painters wear respiratory equipment and coveralls in the paint booths. As a result, they work in a very warm environment requiring periodic breaks.

On October 14, 2002, Ed Sutton became an employee of Respondent. He continued working at Plant 3, at least part of the time, until January 13, 2002. His work as a painter was satisfactory. After sixty and ninety days on Respondent's payroll, Sportpaint increased Sutton's salary. After ninety days, Respondent was paying him $12 per hour. At some time during this period, Sutton was transferred to the second shift. This "floating" shift worked evenings at both plants 2 and 3, which are approximately ten minutes travel time from each other. Sportpaint's operations at plant 2 involve low volume, high quality work with very expensive paints. The painting at plant 2 requires much more skill than that at plant 3.

While Sutton was on the floating shift, he worked with April Motley, the daughter of Respondent's operations manager, Steve Motley. Sportpaint hired April Motley in September 2002, as a painter. Two months after she started work, April Motley spoke to her father and to Human Resources Administrator Toi Watkins about getting rid of the Union.[1] The Union had been certified as the collective bargaining representative of Respondent's production and maintenance employees only seven months previously, on April 18, 2002.

Steve Motley told April Motley to see Watkins, (Tr. 510). April Motley asked Watkins how she could get rid of the Union (Tr. 387). Watkins told April Motley that she would contact Respondent's attorney. After speaking with her attorney, Watkins told April Motley that if she was still interested in decertifying the Union she could circulate a petition amongst the employees. Watkins also testified that she told Motley that she could not discuss the petition with Respondent's supervisors and could not circulate the petition on work time, (Tr. 389).

[1] Watkins apparently was married sometime in the 2002-03 timeframe. Her maiden name was Toi Johnson. In about March 2003, her title changed to Manager, Administration and Business Support.

There is no evidence that Respondent provided April Motley with any other assistance in circulating the decertification petition.

On January 13, 2003, Respondent transferred Sutton to the first shift at Plant 2. He worked at Plant 2 for about three months. During that time Sportpaint issued Sutton one disciplinary warning for improper work on February 28, 2003.

While Sutton was working at plant 2, April Motley gave him a decertification petition while he was on his lunch break. This petition had approximately nine names on it. Sutton testified that on the same day, he attempted to talk about the petition with Steve Motley at plant 2. He further testified that Motley told him that he could not discuss the petition and that Sutton would have to talk to Toi Watkins (Tr. 38). Sutton testified that he handed Watkins, who was also at plant 2, the decertification petition and asked her what to do with it. According to Sutton, Watkins told him that he needed to get a majority of the employees to sign the petition and then bring it to her and that she would forward the petition to Respondent's attorneys, (Tr. 39-40).

Watkins denied having any conversation with Sutton about the decertification petition at plant 2. She contends that her first contact with Sutton regarding the petition occurred on or about March 13, 2003. She testified that Sutton came to her office at plant 3 and handed her the petition (Tr. 390). Implicit from her testimony is that all 31 signatures that appear on the petition were on the document when she first saw it. Watkins copied it and told Sutton that she would fax it to Respondent's attorneys to determine what Sutton should do with it. Watkins testified that Sutton asked her what to do with the petition—although it is not clear from her testimony whether his inquiry was made before or after she asked to copy it (Tr. 395-96). Sutton confirms that he presented Watkins with a petition containing all 31 signatures that appear on it in her office at plant 3. Sutton had obtained approximately 22 of these signatures. The disputed part of their testimony is whether Sutton talked to Watkins about the petition at plant 2, prior to the time he presented the completed petition to Watkins in her office. I credit Watkins and conclude that Sutton did not do so.

At some time in March, Sutton also complained to Watkins about his supervisor, Bobby Shepherd. Sutton testified that he talked to Watkins about Shepherd at the same time he first discussed the decertification petition. Watkins contends that Sutton complained to her about Shepherd at plant 2 about a week prior to his visit to her office with the petition. Watkins promised to talk to Shepherd about the manner in which he treated employees. She testified that she told Shepherd he should maintain a "positive environment" for his employees, without mentioning Sutton by name. I credit Watkins. For one thing, Sutton's testimony on direct and cross-examination is somewhat inconsistent. At Tr. 40, he testified that he discussed Shepherd with Toi Watkins at the same time he presented her with the decertification petition. At Tr. 172, he testified that he discussed Shepherd with Watkins in a separate conversation later the same day.

On March 14, Shepherd presented Sutton his performance rating for the period during which Sutton had worked at Sportpaint and discussed it with him. Sutton was rated in a variety of areas, including attendance, productivity and quality. Respondent rated employees on a scale of 1 –5: 5, outstanding; 4, Excellent; 3, Satisfactory; 2, Improvement Desired [Work is acceptable, but occasionally below quality and quantity standards]; 1, Improvement Essential. Shepherd gave Sutton an overall rating of 3; however, he rated him as a "4" in attendance and a "2" in "Performs accurate and high quality work." On the other hand, Shepherd rated Sutton a "3" in "maintains a low rate of rejection within area of responsibility." Sutton concedes that Shepherd told him that he needed to improve the quality of his work—particularly with regard to applying coats of paint that were too thin (Tr. 609).

On April 15, 2003, over a month after Sutton gave Watkins the decertification petition, she sought him out at plant 2 and gave him written instructions for filing a decertification petition with the NLRB Regional Office in Cincinnati, Ohio (G.C. Exh. 3). These instructions included the date of the representation election, the date of the Union's certification and the size and description of the bargaining unit. Six days later, Sutton was transferred to plant 3 primarily to paint bumpers and seat backs.

Sutton testified that he had several or many conversations with Toi Watkins concerning the filing of the decertification petition after his transfer. Watkins testified that she talked to Sutton about the petition five times: March 13, April 15, May 8 (twice) and May 19. I credit Watkins because I deem her generally to be a more credible witness than Sutton.

On May 8, Sutton approached Watkins at plant 3 and told her that his wife had faxed the decertification petition to the NLRB. Sutton also told Watkins that the NLRB would send the petition to the Union and that the Union would have two weeks to oppose the petition. Watkins called her attorney, who told her to ask Sutton to repeat this because it did not sound accurate. Watkins went back to Sutton, who again told her that the Board would send the petition to the Union.[2]

On or about May 19, Watkins told Sutton that Respondent had not received anything from the NLRB indicating that a decertification petition had been filed. Sutton told Watkins that he had had spoken to a Board employee named Mark S. Respondent determined that there was no such person in the Cincinnati Regional Office and had no further discussion about the decertification petition with Sutton. Respondent filed an RM petition with the Board on May 30, 2003.

Respondent took several disciplinary actions regarding Ed Sutton almost immediately after determining that he had not filed the decertification petition. On May 21, his immediate supervisor, Production Coordinator Sandy Downs, gave Sutton a disciplinary warning for failing to purge the lines of the reciprocater machine at the end of his shift. Operations Manager Steve Motley issued a disciplinary warning to Downs for the same incident.

On May 28, Respondent disciplined Sutton for allegedly being tardy on three separate occasions. On that date, Sutton's supervisor, Sandy Downs presented Sutton a counseling form prepared by Toi Watkins on May 13 for an allegedly second unexcused tardy within a 120-day period on May 7, (R. Exh. 5). Jason Heflin, who also reported late to plant 3 on May 7, was not disciplined for being tardy on that date, but was counseled for being tardy on another occasion a few days later (R. Exh. 9, Tr. 414-15). Downs also presented Sutton with a counseling form suspending him for one day for allegedly being tardy a third time on May 23, (G.C. Exh. 6). Watkins prepared this form on May 23, but there is nothing in the record that definitively establishes the date on which Sutton was allegedly tardy. He denies being late for work more than once.[3]

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[2] I credit Watkins as to what occurred on May 8. Sutton denied that he ever told Watkins that he had sent the petition to the NLRB. At Tr. 68, Sutton testified that in his last conversation with Watkins, she asked him to whom he'd been talking at the NLRB. This testimony suggests that Sutton had already told her that he had been in contact with the Board.

[3] Watkins testified that Exhibits R-8 and R-9 are the records that she received from the production co-coordinators regarding employees who show up late for work. There is no such supporting document for Sutton's alleged third instance of tardiness in the record.

Prior to May 28, Respondent had not given Sutton any warnings or discipline regarding being late to work. Respondent prepared a counseling form for an alleged tardiness on March 28 or 29, 2003, but neither a Sportpaint manager nor Sutton signed the form. Respondent never gave Sutton this counseling form, but relied upon the March 28 or 29, alleged tardiness in suspending him on May 28.

Respondent has apparently counseled and suspended other employees for tardiness. For example, William Quick was apparently suspended on July 16, 2003 for his third unexcused tardy. April Motley was apparently suspended for one day in August 2003 and again in September 2003. David Thomas was apparently suspended for one day on June 25, 2003.[4]

Sutton worked with painter David Thomas on May 27, and 28, 2003. On May 27, 30.36% of the seat backs they painted were rejected and thus had to be sanded and repainted. The next day about 22% of the seat backs were rejected. Respondent considers a reject rate of 10% or less to be acceptable. Sutton did not work on May 29. Sandy Downs and David Thomas painted the seat backs on that day and had a reject rate of about 11%.

On June 1, James McDill, formerly Respondent's quality manager, assumed responsibility for Plant 3 as operations manager. On June 2, Steve Motley, in McDill's presence, presented disciplinary warnings to Ed Sutton and David Thomas for their rate of rejected parts painted during the prior week. Sutton conceded that the rejection rate was unacceptably high but contended it was not his fault and that the rate of defective parts was a result of equipment malfunction and understaffing (Tr. 77). Sutton testified that his attitude towards Respondent soured towards the end of his employment at Sportpaint (Tr. 69). This may also explain the rejection rate for the parts he painted.

Other painters who had comparable rejection rates on other occasions were not disciplined. For example, between April 1, and April 10, 2003, the reject rate for seat backs was over 20% on 6 out of 8 days. It ranged from a high of 29.51% during this period to a low of 18.41%. There is no indication that any of the painters involved were disciplined or transferred to a non-painting position.

The reject rate on the seat backs was also very high on several occasions in July 2003. On the first shift on July 17, the reject rate was 32.99%. There is no indication that James McDill either disciplined the painters or removed any of them from the paint booth. On the other hand, Respondent has disciplined painters and supervisors for a variety of performance-related issues.[5] Those in the record include (G. C. Exhs. 20-26):

Sandy Downs: counseled for failing to purge the reciprocater on May 20 or 21;

Aimee Morris: counseled for not having a painter in the spatter booth on December 9, 2002—resulting in the rejection of 500 parts;

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[4] There is a lack of uniformity with regard to the manner in which Respondent's counseling forms were prepared. Some supervisors noted the date on which the counseling was presented to the employee in the upper right hand corner. Others apparently did not do this. Some supervisors noted the previous instances of tardiness upon which a suspension, for example, was based. Others did not.

[5] Watkins testified that Respondent has issued employees approximately 50 disciplinary measures in the preceding year for performance issues and 50 more for attendance issues, Tr. 386.

Theresa Dews: for not checking the spatter booth—resulting in 200 parts having to be reprocessed on March 11, 2003;

Sandy Downs: counseled for the improper mixing of paints by her subordinates on April 25, 2003;

David Thomas (who was also counseled with Sutton on June 2, 2003): counseled for failing to prime parts prior to painting on February 25, 2003.

The rejection rate for Sutton and Thomas was 26.10% on May 30; 14.31% on June 2; and 14.89% on June 3. On June 4, Sutton was absent from work and Thomas painted with Sandy Downs. Their rejection rate was 9%. The next day, June 5, Sutton returned to work. At about 9:30 or 10:00 a.m., James McDill checked the rejection rate so far that day and determined that it was over 30%. He removed Sutton from the paint booth and told him to go sand rejected parts. Sutton refused to do so and left the plant. He never returned to work at Sportpaint.

Sutton concedes that McDill told him that he was being taken out of the paint booth for defective work. Moreover, when he testified at this hearing, Sutton did not take issue with the fact that a high percentage of the parts he was painting on the morning of June 5, were defective. He testified that he told McDill that this was not his fault because he was left alone to paint. Sutton testified that his supervisor, Sandy Downs, had pulled his partner, David Thomas, out of the paint booth to perform other tasks (Tr. 87-91).

*Additional Credibility Resolutions, Analysis and Conclusions of Law*

*Implied promises to remedy employee grievances, Complaint paragraphs 5(a) and (b)*

The General Counsel called two witnesses in this case, Edward Sutton, and Toi Watkins, as an adverse witness. Thus, there is no corroboration for Sutton's testimony about facts contradicted by Respondent's witnesses.

Sutton testified that when he first discussed the decertification petition with Toi Watkins, he also complained to her about the way Bobby Shepherd treated employees. Watkins testified that Sutton discussed Shepherd's behavior with her approximately one week prior to showing her the petition. This portion of Sutton's testimony relates to Complaint paragraphs 5(a) & (b) which allege that Respondent, by Watkins, impliedly promised to remedy employees' grievances if employees supported a decertification petition in February 2003 and promised to remedy grievances in March 2003 if an employee (Sutton) filed the petition.

The evidence supports neither allegation, even assuming that I credit Sutton's testimony. His testimony at Tr. 40-41 does not make clear whether he or Watkins initiated the discussion about Bobby Shepherd. Moreover, he merely testified that, in his first conversation with her, Watkins told him that she didn't know anything about problems with Shepherd and that she advised Sutton to tell other employees about Respondent's open door policy. There is no suggestion in this testimony that Watkins explicitly or impliedly offered to remedy any grievances in exchange for employee support for the decertification petition. Moreover, I credit Watkins and note that on cross-examination Sutton testified that his first conversation about Shepherd did not occur at the same time that he presented the decertification petition to Watkins.

However, Sutton also testified that after having some trouble getting signatures on the decertification petition, he called Ms. Watkins again. He testified that he told her employees were reluctant to sign due to unresolved problems, including Bobby Shepherd's management

style. Sutton then testified that Watkins told him that if Respondent had to spend less time on Union matters or getting rid of the Union, it could spend more time addressing problems at Plant 2. I decline to credit Sutton. Therefore, I dismiss Complaint paragraphs 5(a) & (b).

*Paragraph 5(c) Assistance in filing the decertification petition*

Respondent concedes that it gave Sutton written instructions as to where to file the decertification petition and what information to provide to the Board. However, I conclude that it did not violate Section 8(a)(1) in doing so. Moreover, I decline to credit Sutton's testimony regard other forms of alleged assistance.

The Board has consistently held that an employer violates Section 8(a)(1) by actively soliciting, encouraging, promoting or providing assistance in the initiation, signing or filing of an employee petition seeking to oust a bargaining representative. However, it has also held that an employer may answer questions by employees who have already decided to pursue an effort to get rid of their bargaining representative and/or provide them with strictly ministerial assistance, *Wire Products Mfg., Corp.,* 326 NLRB 625 (1998); *Central Washington Hospital,* 279 NLRB 60, 64; *Placke Toyota, Inc.,* 215 NLRB 395 (1974); *Eastern States Optical Co.,* 275 NLRB 371, 372 (1985); *Amer-Cal Industries,* 274 NLRB 1046, 1051 (1985). The United States Court of Appeals for the Seventh Circuit has framed the issue as being whether the employer interfered with employee free choice, *Vic Koenig Chevrolet, Inc. v. NLRB,* 126 F. 3d 947, 950 (7th Cir. 1997).

I conclude that by providing Sutton with information and suggestions for filing the decertification petition in April, Respondent did no more than provide ministerial assistance to employees who had already decided to try to decertify the Union. I therefore dismiss Complaint paragraph 5(c).

*Paragraph 6(a): Did Respondent allow Sutton to circulate the decertification petition on working time?*

The General Counsel alleges that Respondent violated Section 8(a)(1) in allowing Ed Sutton to circulate the decertification petition during working time at plants 2 and 3. With regard to Plant 2, Sutton testified that on the day he first showed the decertification petition to Watkins, he also showed it to Bobby Shepherd, who told him that he could not talk to Sutton about it. Sutton further testified that he had no other conversation with Shepherd about the petition on this date.

Sutton then testified that Shepherd must have known that he was circulating the petition on work time because Shepherd saw him in areas in which he would not normally be seen. I decline to find that Shepherd allowed Sutton to circulate the petition on work time solely on the basis on Sutton's testimony speculating on Shepherd's mental state.

Additionally, Sutton testified that an unidentified production co-coordinator assisted him by translating for him when speaking to non-English speaking employees. The General Counsel has not established that this individual was either a supervisor or agent of Respondent within the meaning of the Act. Furthermore, the testimony is inherently incredible in that Sutton suggests that this employee, who spoke one foreign language, such as Serbo-Croatian, was able to translate for him when speaking to employees who spoke only Vietnamese or Spanish.

*Paragraph 6(b): Did Respondent transfer Sutton to Plant 3 to assist him in circulating a decertification petition?*

Edward Sutton also testified that after he obtained a number of signatures at plant 2, he went back to his supervisor, Bobby Shepherd, and told Shepherd that he didn't want to have to take a day off to get signatures at plant 3. He testified further that Shepherd responded by telling Sutton "it so happens that" Respondent needed a painter at plant 3 to observe trials on a new bumper and sent him there the next day. This testimony is uncontradicted in that Bobby Shepherd did not testify at the instant hearing. Nevertheless, I decline to credit Sutton's testimony suggesting that Shepherd sent him to Plant 3 so that he could obtain signatures on the petition. If either Sutton or Respondent wanted additional signatures from plant 3 employees, there was no need to transfer Sutton. He could have given the petition back to April Motley, who still worked at plant 3. Moreover, Sutton's testimony on direct examination appears somewhat inconsistent with his testimony on cross-examination.

On cross-examination at Tr. 135, Sutton testified that Shepherd told him he was being transferred to Plant 3 as part of an employee rotation and that another painter was being transferred to Plant 3 as well. There is no suggestion on cross-examination that the transfer was made even partially as a response to Sutton's desire to circulate the decertification petition at plant 3. I decline to find that this was a motive for the transfer and thus dismiss Complaint paragraph 6(b).

*Paragraph 7: Alleged Coercive Interrogation*

The General Counsel alleges that Toi Watkins and Steve Motley coercively interrogated Ed Sutton as to whether he had filed a decertification petition and coercively encouraged him to file such a petition. Sutton's testimony, controverted by Watkins and Motley, is that after he indicated a desire to file a decertification petition, they repeatedly asked about its progress. I credit Motley's testimony at Tr. 511 that he never asked Sutton about the status of the decertification petition.

I have previously credited Watkins that she only spoke to Sutton on March 13, April 15, May 8 (twice) and May 19. Of these, Watkins initiated the April 15 conversation, in which she gave Sutton written instructions regarding the filing of the petition, the second conversation on May 8, and the May 19 conversation. The second conversation on May 8, and the May 19 conversations were natural follow-ups to the first May 8 conversation in which Sutton informed Watkins that his wife had filed the decertification petition. Since Sutton never indicated to either Watkins or Motley that he had a change of heart, I deem that Watkins' inquiries were not coercive. Sutton does not contend that either Watkins or Motley ever threatened him if he didn't file the petition. I therefore dismiss Complaint paragraph 7.

*Disciplinary actions alleged to have violated Section 8(a)(3) and (1) in Complaint Paragraph 8(a)–(d)*

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB No. 177 (2002).

The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *American Gardens Management Co.,* 338 NLRB No. 76 (November 22, 2002). Unlawful motivation is most often established by indirect or circumstantial evidence, such as the suspicious timing of disciplinary action, pretextual reasons given for the discipline and disparate treatment of the discriminatee(s) compared with employees without known union sympathies.

I find that Edward Sutton's decision not to file the decertification petition was protected by the Act. Respondent was clearly aware that he had decided not to do so. While the General Counsel often relies on circumstantial evidence to establish animus and discriminatory motive, I conclude that the record evidence on these two factors is extremely weak and with regard to motive, fatally so.

I assume that Respondent was annoyed when it determined that Sutton had not filed the decertification petition after telling Toi Watkins that he had done so. Sportpaint could not have withdrawn recognition of the Union on the basis on this petition because all 31 employees signed the petition prior to the end of the certification year, *Chelsea Industries,* 331 NLRB 1648 (2000). However, Sutton did not testify that any official of Respondent made any express or implied threat to him due to his failure to file the petition.

In arguing that Respondent's personnel actions were discriminatorily motivated, the General Counsel relies on the fact that other employees did not receive discipline for conduct similar to Sutton's and the proximity in time of the disciplinary actions taken against him to Respondent's realization that Sutton had failed to file the decertification petition, as he had promised.

The General Counsel alleges in complaint paragraph 8(a) that Respondent violated Section 8(a)(3) and (1) in transferring Sutton to Plant 3 and requiring him to work an extended time in the paint booth without relief. First of all, it is clear that Sutton was transferred to Plant 3 in April 2003 for non-discriminatory reasons. Moreover, there is no evidence to suggest that Respondent had any reason to retaliate against Sutton at that time. For example, not until May 19, weeks after the transfer, was Respondent aware that Sutton was having second thoughts about filling the decertification petition.

With regard to insufficient breaks, Sutton testified that when he returned to plant 3, two painters were assigned to do work that three painters had performed when he worked at plant 3 previously. There is no basis on which to conclude that Respondent made this change to retaliate against Sutton for failing to file the decertification petition. Sutton's testimony indicates that from the outset of his return to plant 3 there were fewer painters doing the work than when he worked there previously. If that was the case, the change was instituted prior to the time that Respondent became aware that Sutton was not going to file the decertification petition, and thus prior to the time that Respondent had any motive to discriminate against him for protected activities.

Similarly, Sutton testified that on June 5, he was not given sufficient relief because Supervisor Sandy Downs assigned his partner, David Thomas, other tasks (Tr. 87-88). Assuming this is true, I see no basis for inferring that Sutton was left alone in the paint booth on June 5, due to animus concerning the decertification petition. Indeed, Sutton's testimony suggests that Thomas was moved out of the paint booth for non-discriminatory production reasons. On these facts I decline to draw the inference that Sutton was assigned to Plant 3 or deprived of breaks for discriminatory reasons. I therefore dismiss paragraph 8(a).

Paragraph 8(b) concerns the May 21, 2003 warning issued to Sutton for failure to purge the lines of the reciprocator. Sutton concedes the reciprocator lines were not purged, he merely contends it was Sandy Down's fault, not his. As Respondent also issued a warning to Downs for the same incident, I see no basis for concluding that this warning was discriminatorily motivated.

Paragraph 8(c) involves a warning and 1-day suspension issued to Sutton for tardiness. Here again there is insufficient evidence to warrant a finding of discriminatory motive. The General Counsel relies on the fact that Respondent had not presented Sutton with any discipline regarding tardiness until May 28, 2003, and then punished him for allegedly being tardy on three occasions. As the General Counsel points out, Respondent gave Sutton no opportunity to improve his behavior, which its handbook states to be one of the rationales for its progressive disciplinary system, R. Exh. 2, page 22.

Toi Watkins testified that tardiness warnings were often prepared sometime after the offense in question due to the press of other job duties and that they were often presented to employees by their supervisors on a similar irregular basis. Indeed, Respondent's tardiness recording appears to lack uniformity in a number of respects, e.g., documenting all prior instances of tardiness and documenting the date on which tardiness counselings were presented to employees.

The timing of the tardiness counselings and suspension is very suspicious due to the proximity of this discipline to Respondent's discovery of the fact that Sutton was not filing the decertification petition. My suspicions are heightened by the lack of probative evidence that Sutton was in fact tardy on three occasions prior to May 28. However, I decline to conclude that the tardiness warnings and suspensions were discriminatorily motivated. Watkins provided an explanation for the presentation of the tardiness disciplines on one day, which I credit in the absence of any other evidence of animus towards Sutton's protected activity and the apparent lack of consistency in the preparation of Respondent's tardiness documentation.

Paragraph 8(d) is also dismissed. Respondent gave Sutton a warning on June 2 for defective work during the prior week. His partner, David Thomas, received an almost identical warning. Respondent has not explained why Sutton and Thomas were disciplined for a high rate of rejects and other employees were not similarly disciplined, for example, in April 2003. On the other hand, other employees were disciplined for unsatisfactory work. Given the paucity of evidence of animus towards Sutton's protected activity, I am unable to infer that Sutton's discipline was discriminatorily motivated.

*The alleged demotion and constructive discharge: Complaint paragraphs 8(e)& (f)*

Sutton testified that on June 5, 2003, his last day at Sportpaint, McDill told Sutton that he was removing him from the paint booth and sending him to the refinish area to sand defective parts. Sutton also testified that McDill told him that he was reducing Sutton's salary by $4 per hour. McDill denies this and testified he did not mention Sutton's pay rate at all. I deem McDill to be more credible than Sutton on this issue on the basis of their respective demeanors, inconsistencies in Sutton's testimony and the implausibility of some of Sutton's testimony.[6]

[6] Sutton testified that he told Toi Watkins that employees at plant 2 were sabotaging production in order to make Bobby Shepherd look bad—in the hope that Respondent would fire, transfer or chastise Shepherd (Tr. 40-41, 194-96). I find it very unlikely that employees, who according to Sutton were afraid that Watkins would fire them at the drop of a hat, would act in

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Since I find that McDill did not tell Sutton that his pay was being reduced, I dismiss Complaint paragraphs 8(e) and (f). Sutton's transfer from the paint booth to the refinish area does not constitute a constructive discharge.

The test for constructive discharge is:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.[7]

The General Counsel has not established that the transfer to the refinishing job imposed a burden so difficult or unpleasant so as to force Sutton to resign. He also failed to establish that the transfer or demotion to the refinish area was motivated by animus towards Sutton's refusal/failure to file the decertification petition. Sutton did not take issue with Respondent's assertion that his reject rate was extremely high on the morning of June 5, and I credit McDill's testimony that he took Sutton out of the paint booth for nondiscriminatory production reasons.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., March 15, 2004.

Arthur J. Amchan
Administrative Law Judge

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such a way, or that Sutton would say such a thing to Watkins.

Similarly, Sutton testified that as of June 2, 2003, he didn't know who James McDill was (Tr. 152), but later testified that several months earlier he had asked April Motley if McDill was aware that she was circulating the decertification petition (Tr. 168).

[7] *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976). Had Respondent materially reduced Sutton's pay rate in retaliation for protected activity, it may well have constructively discharged him, *Pillsbury Chemical Co.,* 317 NLRB 261 (1995); *Holliday Inn of Santa Maria,* 259 NLRB 649, 662 (1981).

*Dico Tire, Inc.,* 330 NLRB 1252 (2000), relied upon by the General Counsel, is not a constructive discharge case. In *Dico*, the Respondent claimed that the discriminatee quit; the Board found that he was discharged. The fact that an employee is provoked into leaving work does not necessarily constitute a constructive discharge if the change in his or her working conditions is not sufficiently onerous.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.